IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 74-107

PETER PREISER, Commissioner of Correctional Services of New York State, and HAROLD BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

-against-

JAMES NEWKIRK,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, James Newkirk, who is now held in a New York State prison, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The respondent's affidavit in support of this motion is attached hereto.

WILLIAM E. HELLERSTEIN
DANIEL POCHODA
MARJORIE M. SMITH
Attorney for Respondent
The Legal Aid Society
Prisoners' Rights Project
15 Park Row
New York, New York 10038
[212] 374-1737

SUPREME COURT OF THE UNITED STATES

- -x

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-against-

JAMES NEWKIRK

Respondent.

NO. 74-107

AFFIDAVIT

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF SULLIVAN)

JAMES NEWKIRK, being duly sworn, deposes and says:

I am the respondent in the above-captioned case, and I make this affidavit in support of the attached motion to proceed in forma pauperis.

I am unable because of my indigence to pay the costs of this case or to post security therefor.

I believe in good faith that I am entitled to the relief that I am seeking in this case.

WHEREFORE, I respectfully pray that the requested relief be granted.

James Newkirk
JAMES NEWKIRK

Sworn to before me this
9th day of September, 1974

Lois A. Stamatedes
NOTARY PUBLIC

LOIS A. STAMATEDES
Notary Public, State of New York
Residing in Ulster County
Commission Expires March 30, 1975

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OF COUNSEL:

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BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether a prison inmate whose transfer from a medium to maximun security penitentiary for alleged misconduct substantially alters the nature and conditions of his confinement is entitled, as a matter of due process, to notice and the right to be heard. -/-

Statement of the Case

In July, 1972 this action was commenced in the District Court by respondent and three other plaintiffs. The complaint alleged that plaintiffs were transferred by petitioners from Wallkill, a medium security institution, to various maximum security institutions without notice of charges and an opportunity to be heard, in violation of their rights under the Fourteenth Amendment, and prayed for declaratory and injunctive relief.

The District Court heard extensive testimony from plaintiffs James Newkirk and Cornelius Lucas,* and two other witnesses on their behalf. The court also heard testimony from petitioner Harold Butler and from Walter Dunbar, a former Executive Deputy Commissioner of Correctional Services. Depositions of various officials at Wallkill, and of one inmate, Warren Barnes, were also made a part of the trial record.

Witnesses appearing for both sides attested to the substantial differences between Wallkill and Clinton Correctional Facility, the maximun security institution to which respondent was transferred. It was established that at Wallkill inmates live in rooms rather than barred cells, move freely about unaccompanied by prison guards, and are afforded extensive periods of free time in which to pursue whatever activities they wish. It was further established that at Wallkill inmates have access to numerous recreational and rehabilitative programs not available at a maximum security facility such as Clinton.

* Prior to the trial, plaintiffs Carl Oliver and David Rodriguez were paroled and their cases were dismissed as moot.

While at Wallkill, respondent was able to pursue his interests in auto mechanics and truck driving, music, and art-work. However, at Clinton, he was unable to continue these activities.* Since Clinton is located much further from New York City than Wallkill, respondent's family was unable to visit him following his transfer. He was no longer permitted to telephone them, a privlege afforded at Wallkill. Additionally, respondent was placed in "idle" status in segregation upon arrival at Clinton and thus deprived of the wages he had been earning at Wallkill.

Respondent was transferred from Wallkill because the Superintendent decided that he was a leading proponent of an inmate labor union at Wallkill. This decision was based on nothing more than third-hand reports from correction officers who had not personally observed respondent's conduct.** In fact, respondent's role in supporting the inmate union was limited to signing an authorization form on June 2, 1972 and passing it on to another inmate. The inaccuracy of the reports the Superintendent received was indicated by his admission that an investigation concerning one inmate conducted after the transfers revealed that he was significantly less involved in the union effort than had been thought originally ; petitioner conceded that had this been known earlier, this man might not have been transferred.

Respondent was transferred from Wallkill on June 8, 1972 without warning, and without receiving any explanation for the transfer. The transfer came as a complete surprise, since

* Because of Wallkill's unique features, admission to that facility is achieved only after a prisoner has spent time at a maximum security facility and been screened for suitability to the Wallkill program. Respondent first applied to Wallkill in 1965, but was not accepted until 1971.

** Petitioner Butler stated that he transferred those inmates he had been informed were causing unrest at the prison by their continued advocy of the union on June 5th and 6th. However, the report he relied upon simply listed inmates allegedly active in circulating the union forms on June 2nd and 3rd.

up until the day it occurred respondent had been participating fully in Wallkill programs and had never been told that his behavior was in any way objectionable.

At the close of the trial, respondent and his remaining co-plaintiff were returned to Wallkill, and the parties discussed and tentatively agreed upon a consent order to settle the case. However, petitioners ultimately declined to sign a consent judgment, having concluded that any such order would "stigmatize" petitioner Butler, and moved instead to dismiss respondent's case as moot.* Respondent urged the court to grant the requested declaratory and injunctive relief since petitioners refused to alter their transfer practices at Wallkill.

On October 9, 1973, the District Court rendered its decision (Appendix C). It held that respondent's transfer from Wallkill violated his rights under the Due Process Clause both because he was not afforded notice of the transfer and an opportunity to be heard, and because he was never informed that his conduct might result in transfer.** The declaratory judgment entered by the District Court on October 26, 1973 decreed that respondent could not be transferred in response to his activity without being afforded a hearing at which he would be given notice of the charges and an opportunity to be heard, that he was entitled to have no adverse action taken against him because of his transfer from Wallkill, and that he was entitled to know what behavior was permissible at Wallkill and the circumstances which in petitioners'

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*Respondent agreed to the dismissal of Lucas' case since he had been paroled on February 22, 1973.

**The Court stated that where compelling reasons for immediate transfer existed, the required hearing could be held following the transfer. However, it found that on the date of respondent's transfer there was no "clear and present danger" at Wallkill which justified his transfer without warning.

opinion would warrant his transfer to another prison.*

Petitioners appealed the district court's decision and judgment. On June 3, 1974 the court of appeals rendered a decision affirming that portion of the District Court's decision and judgment which held that respondent was entitled to minimal due process before being transferred from a medium to a maximum security institution.**

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*After judgment had been entered, petitioners asked the district court to resettle its order to avoid any misconception that it applied to other than "disciplinary" transfers. The Court denied the request, stating that the judgment was sufficiently clear and narrowly drawn.

**The court of appeals reversed the district court's requirement that respondent was entitled to know in advance all the acts that would lead to a transfer partially on the ground that such a requirement could be complied with only through the use of "vague and meaningless generalities". (Appendix, 21).

ARGUMENT

In urging the Court to grant certiorari in this case, petitioners have vastly exaggerated its scope. The question involved in this case is not whether "the Due Process Clause applies to every loss of privilege and every deprivation that is suffered by a prison inmate" or whether every federal and state prisoner transferred from one prison to another should receive some formof due process.(Petition, 13, 18). Nor,finally, is it whether correction officials should be permitted to transfer inmates to prevent assaults, to implement classification decisions, or to respond to budgetary or staffing constraints. (Petition, 13, 15-17). Rather, the issue is simply whether a prisoner whose transfer from a medium to a maximum security institution for alleged misconduct substantially alters the conditions of his confinement is entitled to notice and an opportunity to be heard. On this issue the decision of the court of appeals was clearly correct, and there is no conflict among the lower federal courts. Manifestly, there is no important question of federal law requiring decision by this Court.

I

THE DECISION BELOW IS CLEARLY CORRECT AND THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

A. Based upon a detailed examination of the changes in respondent's living situation resulting from his transfer, the district court found that respondent had suffered a substantial loss and therefore should have been afforded minimal due process. The Court's conclusion was based on its finding that there was a striking contrast between conditions at Wallkill and at the maximum security prison to which respondent was transferred.* The record showed that at Wallkill inmates live in rooms rather than barred cells, move freely about unaccompanied by prison guards and are afforded extensive periods of free time. At Clinton, cells are locked, movement is restricted and recreational and rehabilitation programs much less extensive and accessible. Moreover, respondent was not able to receive visits from his family at Clinton since that prison is much further from New York City where they live. Additionally, respondent was segregated upon his arrival at Clinton and deprived of the opportunity to work or earn wages for a period of time.**

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*Far from being "vague and unworkable" (Petition, 19) the classification levels relied upon by the courts in the instant case are reflected in state law (N.Y. Corr. L. sec. 70; 7 N.Y.C.R.R. sec. 100.30).

**This brief description makes clear that the courts below did not focus only on respondent's loss of job and training opportunities and the distance involved in his transfer (Petition, 19) but instead looked at the totality of changes in his living situation. Additionally, petitioners have no factual basis for their assertion that the harm caused respondent by this transfer was no greater than that occasioned by his previous transfers from one maximum security prison to another.

While petitioners have never questioned these factual findings of the district court, they have maintained that due process protections should be required only when a transfer is imposed "solely as a disciplinary punishment in response to an act of misconduct", and not when it is "administrative." (Appendix, 26). This position was considered sophistry by the courts below, since it gives insufficient weight "to the very real loss that an inmate may suffer even when his transfer is not part of formal disciplinary proceedings ... " (Appendix, 26). Moreover, it was recognized that it would be paradoxical to require some form of due process prior to a substantial deprivation of benefits and privileges within a prison and yet permit prison officials to impose significant deprivations by means of a transfer without affording the prisoner any due process. (Appendix, 28).

The need for a rational fact-finding process which gives the inmate some opportunity to correct mistaken impressions is particularly obvious in the circumstances of this case. As the court of appeals pointed out, a hearing might well have demonstrated that respondent "was but a passive pawn in a larger power struggle..." (Appendix, 29). Moreover, the Superintendent himself admitted that one prisoner had been transferred in error (an investigation concerning this inmate conducted after the transfers took place revealed that he was significantly less involved in the union than had been originally thought).

After arguing that the decisions of the court below are overly broad since they apply to "administrative" as well as "disciplinary" transfers, in the next breath petitioners attack the courts' decision for having failed to resolve all the"complex issues of penal administration" implicated in this case. (Petition, 17). While it is true that in accordance with respected judicial principles the court of appeals decided

only those issues presented to it, nothing in the court's decision interferes with the valid correctional considerations and goals referred to by petitioners. (Petition, 15-17). Rather than being unconcerned about prison security, the court expressly approved the portion of the district court's order allowing postponement of the required hearing where compelling reason for immediate transfer exists.* (Appendix, 29-30). Moreover, the district court explicitly recognized that some transfers from Wallkill have no disciplinary overtones and therefore need not be accompanied by due process (Appendix, 42). Nothing in the decisions below would inhibit the transfer of inmates due to budget or staffing constraints, nor do they bear upon the correction department's initial decision to choose or reject an inmate for Wallkill.

B. Despite petitioners' claim that there is an important federal question "at the heart of this case" (Petition, 18) we have seen that this case in reality concerns only whether a prisoner transferred from a medium to a maximum security prison should be afforded minimal due process. The decision of the courts below that he should is consistent, both in its reasoning and in its conclusion, with this Court's recent decision in Wolff v. McDonnell, 42 U.S.L. Week

*Petitioners' interest in protecting inmates from reckless exposure to assaults by fellow inmates (Petition, 15-16) is if anything furthered by the court's decision, since reliable fact-finding procedures increase the probability that the inmate who is in fact assaultive will be transferred.

5190 (June 24, 1974) and therefore presents no important federal question.*

In Wolff, both the loss of good time and disciplinary segregation were recognized as major changes in the conditions of an inmate's confinement, requiring due process safeguards. Id. at 5200, fn. 19. In the instant case, the courts below found that when respondent was moved from a medium to a maximum security prison, he suffered a major change in the conditions of his confinement, and was therefore entitled to some measure of due process.** Moreover, the procedural safeguards afforded respondent (notice and an opportunity to be heard) are minimal and similar to those mandated in Wolff. Contrast, Gomes v. Travisono, 490 F. 2d 1209 (1st Cir. 1973), vacated and remanded, ___U.S.___ (July 8, 1974).***

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*As a factual matter, in the eighteen months preceding trial, only eighteen inmates were transferred from Wallkill on grounds of alleged unsuitability. Contrast, Wolff v. McDonnell, supra, 42 U.S.L. Week at 5201 ("During 1973, the Federal Government alone conducted 19,000 misconduct hearings....").

**Since the instant case was decided before this Court's decision in Wolff, the opinion did not employ its precise terminology. However, the court of appeals clearly engaged in the type of factual analysis referred to approvingly in Wolff before concluding that respondent's loss was sufficient to entitle him to due process.

**Petitioners' apparent uncertainty about what elements of due process they must afford transferees (Petition, 18) manifestly presents no important federal question. Even if petitioners are in doubt about the application of Wolff to the instant case, their request for clarification is more appropriately addressed to the court of appeals than to this Court.

II.

THERE IS NO CONFLICT OF DECISION

Finally, while petitioners have cited a number of lower federal court decisions involving the general subject of prisoner transfers, there is no conflict among the Circuits on the issue involved in the instant case.

The Ninth Circuit decisions cited by petitioners [(Faieriak v. McGinnis, 493 F. 2d 468(1974); Hillen v. Director, 455 F. 2d 510, cert. denied, 409 U.S. 989 (19720] concerned inter-state transfers involving the same level of custody rather than intra-state transfers entailing a change in custody level. Nor was the issue presented in the instant case addressed by the court in Gray v. Creamer, 465 F. 2d 179(3d Cir. 1972). The bulk of the court's opinion in that case concerned the question of whether the transfer of a prisoner from the general prison population to solitary confinement must be accompanied by minimal due process. After deciding this question affirmatively, the court devoted only a scant paragraph to a consideration of appellants' claim that their transfer to other prisons without hearings violated their due process rights. There is no indication that the transfers in Gray entailed differing levels of custody.*

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*Petitioners also point to two district court decisions regarding intra-state transfers as conflicting with the instant decision. Benfield v. Bounds, 360 F. Supp. 160 (E.D.N.C.1973); Bundy v. Cannon 328 F. Supp 165 (D. Md. 1971). In fact, in neither case is the holding opposed to that of the Second Circuit here. In Benfield, there was no change in the level of the plaintiff's custody, and for that reason the Court held a due process hearing was not constitutionally required. Moreover, the Court noted that plaintiff had had several opportunities to respond to the factual allegations that led to his transfer, and further held that minimal due process must be afforded before the plaintiff's level of custody could be increased from medium to close. In Bundy, each plaintiff had been given at least some opportunity to reply to the charges which formed the basis for his transfer prior to any action by the District Court. Moreover, the statement that due process was not required where a prisoner was transferred from a lower security institution to a higher one where such a transfer was unaccompanied by extensive confinement in segregation, was simply dictum, since in fact each plaintiff had been so segregated.

In fact, the decision of the court of appeals in this case is in agreement with those of the other federal courts which have considered intra-state transfers involving differing levels of custody. Stone v. Egeler, ____F.Supp.____, 3 Prison L. Rptr. 84 (W.D. Mich. Dec. 18, 1973); Aikens v. Lash, 371 F. Supp. 432 (N.D. Ind., 1974); White v. Gillman, 360 F. Supp. 64 (S.D. Iowa 1973).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: New York, New York
September 18, 1974

Respectfully submitted,

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